

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES E. TAPP, JR.)	
Claimant)	
VS.)	
)	Docket No. 198,699
FERRELL CONSTRUCTION COMPANY)	
Respondent)	
AND)	
)	
BUILDERS ASSOCIATION SELF INSURERS FUND)	
Insurance Carrier)	

ORDER

Respondent appeals from the Award of Administrative Law Judge Brad E. Avery dated February 26, 1999. The Administrative Law Judge granted claimant a 100 percent permanent partial general disability, pursuant to K.S.A. 44-5a01(d), finding claimant's occupational disease was aggravated by his work with respondent, resulting in a 100 percent loss of earning capacity in his prior occupation. Oral argument was held in Topeka, Kansas, on August 4, 1999.

APPEARANCES

Claimant appeared by his attorney, Seth G. Valerius of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Wade A. Dorothy, Lenexa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for the purpose of this Award.

ISSUES

- (1) Did claimant suffer accidental injury or occupational disease on or about October 28, 1994?

- (2) Is claimant entitled to past medical expense for the occupational disease or accidental injury suffered while employed with respondent?
- (3) Is claimant entitled to future medical treatment for the occupational disease or accidental injury suffered while employed with respondent?
- (4) What is the nature and extent of claimant's injury and disability?

Claimant raised the following additional issues in his brief to the Board:

- (1) What is the appropriate date of accident in this matter?
- (2) Is respondent entitled to a preexisting disability credit for the accidental injury and/or occupational disease suffered while employed with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant began working for respondent as a welder in late September 1994. After working for respondent for approximately one month, claimant appeared at the Jefferson County Hospital emergency room on October 31, 1994, complaining of breathing difficulties.

Claimant's job with respondent required that he do galvanized welding. Claimant at times was confined to small spaces with poor ventilation, and at other times was welding outdoors. At the Jefferson County Hospital emergency room, claimant saw Dr. Campbell and Dr. Gregory Waller, who referred claimant to Dr. Shawn Magee. Claimant was also seen by Dr. Doug Frye and ultimately was referred by Dr. Frye to Dr. Robert N. Hill, a board certified pulmonary specialist.

Dr. Hill first saw claimant on November 14, 1994, diagnosing claimant with chronic obstructive pulmonary disease (COPD). The history provided to Dr. Hill indicated shortness of breath going back to an early age. Claimant also indicated to Dr. Hill that he had experienced respiratory symptoms in 1983. Dr. Hill's records indicated claimant began

smoking at the age of 10. But claimant denied smoking at such an early age, testifying that he did not begin smoking until he was 20. Claimant was asked at preliminary hearing about the medical records of Dr. Frye from January 3, 1995, which also indicated he began smoking at age 10. Claimant denied their accuracy as well.

Claimant was taken off work after his visit to the emergency room and has not returned to work for respondent or any other employer since that time. Claimant's entire adult life has been involved in welding and performing mechanical work for various employers.

Claimant testified at preliminary hearing that his breathing difficulties began shortly after beginning work with respondent and continued to deteriorate until he could no longer perform the work. It was at that time that he went to the emergency room at Jefferson County Hospital.

During the preliminary hearing, claimant also described an incident when working for a grain elevator where he was caught in a basement full of grain dust. Claimant was apparently trapped in that basement for approximately four hours. Shortly after that, he was diagnosed with dust pneumonia, which did resolve after a period of time. In addition, in 1980, claimant was diagnosed with pulmonary fibrosis, but the record contains no medical evidence of what treatment claimant may have received at that time.

Claimant's condition was first described by Dr. Hill in November 1994 as "chronic." Dr. Hill indicated that this was a long-standing condition and not something that claimant had developed recently. Dr. Hill opined that the welding exposure may have, in some way, contributed to claimant's condition, but that there was no way the doctor could place any specific percentage on the amount of aggravation caused by the welding. Dr. Hill went on to state that, even without the short history of welding with respondent, the natural progression of the COPD would have resulted in claimant being in the same condition today as he is.

Dr. Hill placed claimant on oxygen and recommended that claimant continue using the oxygen throughout the remainder of his life, even while sleeping. He assessed claimant a functional impairment of at least 75 percent and recommended claimant do sedentary work only in the future. He also restricted claimant's employment to environments free of smoke, dust, fumes and extremes in temperature.

Claimant was examined by Dr. P. Brent Koprivica at the request of his attorney on December 24, 1996. Dr. Koprivica opined claimant's condition represented a Class IV impairment and assessed claimant a 75 percent whole person impairment due to his pulmonary disease, with his rating based upon the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). When asked what, if any, contribution claimant's welding exposure made to the disease, he opined that approximately 50 percent

of claimant's condition would have predated his exposure with respondent, with the other 50 percent being caused by the welding at respondent's business. It was also Dr. Koprivica's understanding that claimant had been smoking since age 10.

He agreed with Dr. Hill's diagnosis of COPD. However, in reviewing the 1997 test results performed by Dr. Gerald R. Kerby, a pulmonary disease specialist, he acknowledged that the findings by Dr. Kerby would place claimant in a Class II impairment, rather than Dr. Hill's Class IV impairment. This would reduce claimant's functional impairment to between 10 and 25 percent to the whole person. Dr. Koprivica did not perform any independent functional capacity evaluations or assessments, but merely used the data provided from the other treating and examining physicians.

Claimant was examined by Dr. Kerby as a court-ordered independent medical examination on May 13, 1997. Dr. Kerby is a professor of medicine, specializing in pulmonology and internal medicine at the University of Kansas Medical Center in Kansas City, Kansas.

At the time of his examination, Dr. Kerby performed several tests on claimant, finding his lung function to be substantially better than that found by Dr. Hill. In reviewing the tests, he found claimant's lung capacity to be either normal or slightly below normal. He opined claimant was no longer in need of oxygen, although the COPD diagnosis continued. Using the AMA Guides, Dr. Kerby classified claimant as a Class II impairment, resulting in a 20 percent impairment to the body as a whole. He did not attribute any part of claimant's ongoing condition to the work with respondent in October 1994. But it is unclear from Dr. Kerby's testimony whether he does not attribute any part of the claimant's condition to a specific event on October 28, 1994, or whether he is discussing the entire period of claimant's employment and the month-long exposure to the welding fumes. At times, Dr. Kerby uses the term "event" singular, and other times uses the term "events" plural in his testimony.

Dr. Kerby was questioned in detail about COPD and a condition that he described as metal fume fever. He testified he had never seen a person with a permanent increase in their asthmatic or pulmonary symptoms from metal fume fever. The zinc fumes, which develop from the welding of galvanized metal, irritate the lungs but do not injure the lungs permanently in the process. He did state that there are other fumes which can occur from welding which can have a permanent effect on a welder's lungs.

When discussing several studies of welders performed in the past, Dr. Kerby noted that smoking welders, when compared to smoking non-welders, have a slightly worse lung function decline. However, when comparing smoking welders to non-smoking welders, it is noted the non-smoking welders have no abnormal decline in lung function. This indicates that it is the introduction of smoking which is the aggravating factor. Dr. Kerby

stated that the smoking effect is between four and ten times more potent than the welding effects on the lungs.

When asked about the overall effect of claimant's employment with respondent, Dr. Kerby stated that, if claimant welded for 22 years, then one week with respondent would be worth approximately one one-thousandth of the total effect on claimant's lungs. As claimant was employed with respondent for approximately four weeks as a welder, this would indicate the effect on claimant would be approximately four one-thousandths of the total effect on claimant's lungs, indicating the aggravation to claimant's lungs with respondent would have been approximately .4 percent of claimant's total condition.

On cross-examination, Dr. Kerby did admit that the events in October 1994 worsened his lung disease. He noted that, when claimant was seen in the emergency room in October 1994, he met the criteria for respiratory failure. However, at the time claimant was examined by Dr. Kerby, his lung function had substantially improved. When cross-examined about the overall effect of claimant's 22-year history of welding, he opined that approximately 5 to 10 percent of claimant's total impairment would be related to the effects of claimant's 22-year history of welding, with the remainder being related to claimant's decades-long history of smoking.

At the regular hearing, the parties were asked, pursuant to K.A.R. 51-3-8, to enter into certain pretrial stipulations. Both parties agreed that claimant suffered accidental injury arising out of and in the course of employment. The record is void of any mention of occupational disease at the regular hearing. The first indication that occupational disease was being considered occurred after the terminal dates had run and shortly before the Award was entered when the Administrative Law Judge sent a letter to claimant's and respondent's counsel requesting that they discuss the application of Burton v. Rockwell International, 266 Kan. 1, 967 P.2d 290 (Kan. 1998). In Burton, the Kansas Supreme Court discussed in detail the occupational disease provisions of the Kansas Workers Compensation Act.

Respondent objects to the consideration of occupational disease in this instance, arguing that the parties should be bound by the prior stipulations. There was never any request made to change or withdraw the stipulations of the parties entered into pursuant to the administrative regulation, and they were neither withdrawn nor amended prior to the issuance of the award in this matter.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

K.A.R. 51-3-8 obligates the parties, at a pretrial conference, to answer certain questions concerning stipulations. Included in those questions is whether the respondent admits claimant met with personal injury by accident and whether respondent admits claimant's accidental injury arose out of and in the course of employment. Both were stipulated to by the parties in this instance. K.A.R. 51-3-8 goes on to state that these same stipulations may be used in occupational disease cases, with the exception that questions regarding "accidental injury" shall be changed to discover facts concerning "disability from occupational disease" or "disablement." At no time was occupational disease mentioned by the parties at the regular hearing or at any time thereafter until raised by the Administrative Law Judge after the close of evidence.

K.A.R. 51-3-8 goes on to state that "permission to withdraw admissions or stipulations shall be decided by the administrative law judge, depending on the circumstances in each instance."

The Appeals Board finds that the stipulations of the parties entered into at the time of the regular hearing are binding upon the parties, absent permission from the administrative law judge to withdraw or amend those stipulations. As no request to withdraw or amend the stipulations was ever made or granted, the Appeals Board finds that claimant suffered accidental injury arising out of and in the course of his employment with respondent pursuant to the stipulations. To do otherwise after the close of evidence would be prejudicial to one or both parties.

With regard to the date of accident, the Appeals Board finds that claimant suffered a series of accidents during his employment with respondent through his last day worked on October 28, 1994. See Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

With regard to the nature and extent of claimant's injury and disability, both Dr. Hill and Dr. Koprivica agree claimant has suffered a 75 percent functional impairment. However, Dr. Hill is unwilling to state what, if any, impairment he would attribute to the injury suffered while claimant worked for respondent. Dr. Koprivica, on the other hand, found that 50 percent of claimant's functional impairment should be assessed to claimant's injury while working for respondent and 50 percent preexisted his employment with respondent.

Dr. Kerby found claimant suffered a 20 percent functional impairment to the body as a whole based upon the tests performed. Dr. Koprivica acknowledged that, if the tests performed by Dr. Kerby were accurate, then claimant's functional impairment would fall in a Class II impairment under the AMA Guides and would result in a functional impairment to the body as a whole of between 10 and 25 percent. The Appeals Board finds, based upon the medical evidence and the tests performed by Dr. Kerby, that claimant suffered a 20 percent functional impairment to the body as a whole stemming from his COPD.

K.S.A. 44-501(c) states in part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The record contains a conflict among the examining and treating physicians. Both Dr. Hill and Dr. Kerby acknowledge that claimant's condition may have been slightly aggravated by his exposure during his employment with respondent. Dr. Kerby did opine that, if claimant's entire 22-year welding history were considered, then each week of exposure would be worth approximately one one-thousandth of the total effect. This would indicate that the aggravation to claimant would be approximately four-tenths of one percent.

Dr. Koprivica, on the other hand, found that the aggravation to claimant during this four-week period represented 50 percent of claimant's overall condition. The Appeals Board, in considering the overall record, finds the testimony of Dr. Hill and Dr. Kerby to be more credible than what appears to be speculation by Dr. Koprivica. The Appeals Board, therefore, finds that, of claimant's 20 percent functional impairment, 1 percent represents the aggravation experienced by claimant while working for respondent. The remaining 19 percent is comprised of the COPD and related pulmonary conditions developed from many years of welding and claimant's long history of smoking. The Appeals Board, therefore, finds that, based upon the evidence in the record, claimant has suffered a 1 percent permanent partial impairment to the body as a whole from his accidental injury while employed with respondent.

The Appeals Board must next consider what, if any, work disability claimant is entitled to resulting from these injuries.

K.S.A. 44-510e(a) states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

Once again, the opinions of the health care providers are divided regarding what claimant can and cannot do as a result of his ongoing physical limitations. Dr. Hill would limit claimant to sedentary work only. Dr. Koprivica did not express an opinion regarding claimant's ability to perform work. Dr. Kerby felt claimant was not limited as a result of the injury suffered while employed with respondent. He does, however, acknowledge that the inactivity resulting from claimant's injuries with respondent has led to significant muscle deconditioning which, while reversible through rehabilitation or a work hardening program, is nevertheless disabling to some degree. The Appeals Board, therefore, finds that claimant is entitled to a work disability under K.S.A. 44-510e for the injuries suffered with respondent. However, the statute requires that a 15-year history of job tasks be considered by the physicians. As no such job task analysis was performed by any expert, nor considered by any of the physicians, no job task loss can be considered when computing claimant's work disability. The Appeals Board, therefore, finds that claimant has failed in his burden of proving what, if any, task loss he has suffered.

With regard to claimant's wages, the parties have stipulated to an average weekly wage of \$507.03. Again, no opinion exists in the record regarding what, if any, income claimant could earn. However, both Dr. Hill and Dr. Kerby agree claimant is capable of performing work, although they disagree regarding the amount of physical labor which can be expended in doing that work. The Appeals Board finds that claimant would be capable of obtaining employment at minimum wage, regardless of whether he was limited to sedentary work as recommended by Dr. Hill or more physical labor as indicated by Dr. Kerby.

Since leaving respondent, claimant has made no effort to obtain employment. Claimant testified at regular hearing that he was totally oxygen dependent and unable to exist at any time without his oxygen tank. Claimant testified that he is obligated to have the tank with him 24 hours a day, seven days a week. However, claimant was videotaped by respondent on two occasions: on December 5, 1997, and on December 16, 1997. Both occurred within four to six weeks of claimant's testimony at regular hearing on November 5, 1997. The videotapes, while short in length, do show claimant performing certain physical activities, including carrying groceries into his house, without utilizing an oxygen tank to assist him in his breathing.

The Appeals Board finds, in considering the policies set forth by the Kansas Court of Appeals in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), that claimant has failed to make a good faith effort to obtain post-injury employment. The Appeals Board finds claimant capable of earning minimum wage at \$5.15 per hour, which computes to \$206 per week. When compared to claimant's agreed average weekly wage, this represents a 60 percent difference between the average weekly wage claimant was earning at the time of the injury and the average weekly wage the claimant is currently capable of earning after the injury. In following the dictates of K.S.A. 44-510e(a), the Appeals Board averages a zero percent task loss with a 60 percent wage

loss, and finds claimant entitled to a 30 percent permanent partial disability to the body as a whole.

Pursuant to K.S.A. 44-501(c), a 19 percent functional impairment is then deducted, representing the preexisting functional impairment for claimant's COPD and other pulmonary disabilities, leaving claimant with an 11 percent permanent partial disability to the body as a whole.

The Administrative Law Judge awarded claimant past medical expenses to include payment for oxygen utilized by claimant at the instruction of his then treating physician, Dr. Hill. The Appeals Board agrees that claimant is in need of oxygen on a regular, although perhaps not continuous, basis and affirms the Administrative Law Judge's award of the past medical expense for this oxygen. The Appeals Board further finds that claimant is entitled to future medical treatment upon application to and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated February 26, 1999, should be, and is hereby, modified, and an award is granted in favor of the claimant, James E. Tapp, Jr., and against the respondent, Ferrell Construction Company, and its insurance carrier, Builders Association Self Insurers Fund, for an injury occurring through October 28, 1994, and based upon an average weekly wage of \$507.03 for an 11 percent permanent partial disability to the body as a whole. Claimant is entitled to 77.86 weeks of temporary total disability compensation at the rate of \$319 per week in the sum of \$24,837.34, followed by 38.74 weeks permanent partial disability compensation at the rate of \$319 per week in the amount of \$12,358.06, making a total award of \$37,195.40, all of which is due and owing at the time of this award and ordered paid in one lump sum minus any amounts previously paid.

Claimant is further entitled to past and future medical treatment as above awarded.

Pursuant to K.S.A. 44-536, claimant's contact of employment with his counsel is approved herein insofar as it does not contravene the provisions of the applicable version of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Gene Dolginoff and Associates

Deposition of Dr. P. Brent Koprivica	\$154.15
Appino & Biggs Reporting Service	
Transcript of Regular Hearing	\$136.60
Transcript of Preliminary Hearing	\$189.60
Deposition of Dr. Robert N. Hill	\$112.00
Nora Lyon & Associates	
Transcript of Preliminary Hearing	\$114.90
Metropolitan Court Reporters	
Deposition of Dr. Gerald R. Kerby	\$202.05

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Seth G. Valerius, Topeka, KS
Wade A. Dorothy, Lenexa, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director